INTRODUCTION.

The following chapters are devoted to one of the phases of the railroad problem. Their purpose is to disclose the relation which has come to exist in this country between the courts and the railroad commissions. To this end they attempt to trace the development of what is termed the doctrine of judicial review—the principle that the courts have jurisdiction to review rates made by commissions and to restrain the enforcement of such as may be found unreasonable. They next endeavor to determine how seriously this doctrine, in its practical application, has affected the efficiency of such commissions as are empowered to establish schedules of railroad rates. And finally, from the difficulties thus disclosed, they venture to point out the possible avenues of escape.

Manifestly the discussion of a subject which involves but one phase of a problem, cannot appear in its proper light without some preliminary exposition of the problem as a whole. Yet so thoroughly familiar are most of the aspects of the railroad problem that their extended treatment must be entirely unnecessary. Accordingly the author has confined himself, in the first chapter, to a portrayal in barest outline of the historical back ground of the problem and of its basis in economic theory. Only those matters which bear a very important relation to the particular question discussed in the later chapters, are subjected to comment of any length. Indeed the whole purpose of the preliminary chapter is to cast the light of history and of theory upon the problem of judicial review, in order to discover its significance, and to determine the point of view from which it should be regarded.

It will be noticed that throughout the work reference is made only to rates established by state commissions, and to the judicial doctrine pertaining thereto. That doctrine, as will be shown, is based upon the Fourteenth Amendment to the Federal Constitution, which forbids each state to deprive any person of property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws. Up to the present time, therefore, the judicial doctrine has operated only as a restraint upon state railroad control. But the significance of the doctrine is much broader than that fact would imply. For the Fourteenth Amendment, in so far as it attempts to preserve the rights of private property from invasion by the states, has a counterpart in the Fifth Amendment, which forbids the national government to take property without just compensation and without due process of law. It is evident, therefore, that should the federal government ever attempt to fix railroad rates, the doctrine of judicial review would be extended to embrace such regulation.

At the present writing (April 14, 1906) it seems probable that before long Congress will enact a rate regulation law, and should that event occur the matter will at once become of great importance. For even if an amendment providing specifically for judicial review should not be incorporated in the act, the courts would nevertheless possess that right just as fully as they now do in regard to state control. Even a provision for judicial review to determine whether rates are "fairly remunerative" would not change the scope of the judicial investigation, for that, as will be seen, is the purpose of judicial review under the Constitution. Thus the courts would assume the same relation to the Interstate Commerce Commission that they now maintain toward the state commissions, and consequently the same serious difficulties which

now confront the states would await the agencies of national control.

But the doctrine of judicial review is of even wider importance, in that it applies not only to the regulation of railroad rates, but to public control of charges in other lines of business as well. Whether the doctrine elaborated in railroad cases is to govern the courts in passing upon charges prescribed by the legislatures for *private* industries which have become so far affected with a public interest as to be subject to government control of their rates—such as warehouses and stock yard companies—is not clear, especially in view of such cases as Budd vs. New York, Brass vs. Stoeser, and Cotting vs. Kansas City Stock Yard Company. Mr. Justice Brewer's remarks in the last named case, though uttered *obiter,* are interesting because of their suggestion of a different form of review in cases involving industries of this kind. However that may be, there is no doubt that the doctrine of judicial review worked out for railroads applies also to the regulation of other forms of *public* business. And so the same restraints placed upon government control of railroads exist in the case of all public service or quasi-public corporations, limiting, for example, the public regulation of street railway fares, and of gas and water rates. These facts lend additional interest to the following inquiry as to the limits which the courts may set, under our Constitution, to public control of railroad rates, and as to the justice and expediency of such limitation.